STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY C. JACKSON,

Plaintiff-Appellant,

v

VERMONT AMERICAN CORPORTAION and SEARS ROEBUCK & COMPANY,

Defendant-Appellees.

UNPUBLISHED
May 21, 1999

No. 204501
Ottawa Circuit Court
LC No. 96-25081-NO

Before: Kelly, P.J., and Gribbs and Fitzgerald, JJ.

PER CURIAM.

Plaintiff Timothy C. Jackson suffered injuries while using a molding head manufactured or distributed by defendants Vermont American Corporation ("Vermont American") and Sears Roebuck & Company ("Sears"). Plaintiff filed a products liability suit alleging that defendants failed to warn about the dangers associated with the molding head. The trial judge granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand.

Plaintiff's claim arises from the operation of the molding head, which is attached to a table saw and used to cut contours and produce such items as picture frames. Plaintiff received the molding head as a gift, without any instructions or owner's manual. Plaintiff contends that his injury resulted from defendants' failure to warn about the dangers associated with the use of the molding head, including the necessity of constructing an "auxiliary fence" to protect the operator.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). A motion may be granted when, except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10). The courts are liberal in finding a genuine issue of material fact. *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992).

When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and any other documentary evidence available

to it. *Patterson v Kleiman*, 447 Mich 429, 434; 526 NW2d 879 (1994). The party opposing the motion has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). All inferences are to be drawn in favor of the nonmovant. *Dagen v Hastings Mutual Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987). On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

In the present case, the trial court concluded that defendants had no duty to warn plaintiff of the dangers of the molding head because the dangers inherent in the molding head were open and obvious, and plaintiff had personal knowledge of those dangers. Plaintiff raises three issues on appeal. First, plaintiff contends that the trial court erred in determining that the dangers of operating the molding head without an auxiliary fence were open and obvious. We agree.

"A manufacturer is liable in negligence for a failure to warn the purchasers *or users* of its products about dangers associated with intended uses and also foreseeable misuses." *Adams v Perry Furniture Co (On Remand)*, 198 Mich App 1, 10; 497 NW2d 514 (1993) (Emphasis added). However, the manufacturer has no duty to warn or protect against the open and obvious dangers associated with simple tools. *Glittenberg v Doughboy Recreational Industries (On Reh)*, 441 Mich 379, 393; 491 NW2d 208 (1992).

The trial court made two errors in its analysis of defendants' duty to warn. First, it erred because it considered plaintiff's personal knowledge of the dangers associated with the molding head. "Determination of the 'obvious' danger of a product-connected danger is objective." *Id.* at 391. A plaintiff's subjective knowledge is immaterial to the determination of an open and obvious danger. *Id.* at 393.

Second, the trial court failed to identify the molding head as a simple tool before finding that its dangers were open and obvious. Although there is no duty to warn of open and obvious dangers, our Supreme Court has narrowed the no-duty rule to cases involving simple tools or products. *Id.* Simply establishing that a product has "open and obvious dangers" does not release the manufacturer from its duty to warn. In *Viscogliosi v Montgomery Elevator Co*, 208 Mich App 188, 188-189; 526 NW2d 599 (1994), this Court adopted the two tests in *Raines v Colt Industries*, 757 F Supp 819, 825 (ED Mich, 1991), to determine whether a product is a simple product, i.e., the product is not highly mechanized and the intended use does not place the user in an obviously dangerous position. While the molding head itself consisted of nothing more than sharp blades mounted in a circular holder, the entire molding head was an accessory to a table saw. In the case of complicated machinery, our analysis focuses on the way the product is used rather than on its underlying mechanical parts. *Id.* See, e.g., *Coger v Mackinaw Products Co*, 48 Mich App 113, 121-122; 210 NW2d 124 (1973), a pre-*Glittenberg* case where this Court rejected the defendant's assertion that a gasoline powered log-splitter was nothing more than a "simple hammer and wedge used during Lincoln's rail splitting days," and concluded that although the dangers of a hammer and wedge may be open and obvious, those tools were not simple tools when attached to a mechanical device which applied two thousand pounds of force to the tools. *Id.*

We conclude that the trial court erred when it applied the open and obvious rule to the molding head without first determining that it was a simple product. Plaintiff presented sufficient evidence to create a factual question as to whether the molding head was a complicated tool which created a duty to warn on the part of defendants. Accordingly, we hold that the trial court erred when it found that defendants had no duty to warn of the dangers associated with operation of the tool.

Second, plaintiff argues that defendants' failure to warn about the need to construct an auxiliary fence was a proximate cause of his injuries. We agree.

"An indispensable element of a products liability case is proof that the manufacturer's alleged negligence proximately caused the plaintiff's injury." *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 250; 492 NW2d 512 (1992). If there is a genuine issue of material fact, causation is to be determined by the jury. *Reeves v Kmart Corp*, 229 Mich App 466, 480; 582 NW2d 841 (1998); *Halbrook v Honda Motor Co, Ltd*, 224 Mich App 437, 446; 569 NW2d 836 (1997). "To establish a prima facie case that a manufacturer's breach of its duty to warn was a proximate cause of an injury sustained, a plaintiff must present evidence that the product would have been used differently had the warnings been given." *Mascarenas, supra*, 196 Mich App at 251. A plaintiff's subjective knowledge of a product's danger is relevant to the determination whether, given the existence of a duty, the defendant's failure to warn was the legal or proximate cause of a plaintiff's injuries. See *Glittenberg, supra* at 393; *Van Dike v AMF Inc*, 146 Mich App 176; 379 NW2d 412 (1985).

The record is clear that plaintiff knew of the potential danger involved in the use of the molding head. However, it is unclear whether plaintiff knew how to adequately remedy any potentially hazardous situation involving the use of the molding head. In fact, it was plaintiff's testimony that he did not know how to properly construct a safety devise for use with the molding head.

The trial court noted that the table saw owner's manual, which plaintiff stated he had read, included a provision for constructing an auxiliary wood facing for cutting small pieces of wood. However, this implement was not intended to be used in the same fashion as the auxiliary wood fence demonstrated in the molding head owner's manual. The wood fence acts as a guard in protecting the operator's hands from the molding head. The wood facing, according to the table saw owner's manual, is intended to prevent thin material from sliding or catching between the metal fence and the table surface.

The table saw owner's manual states that wood should never be run between the molding head and the metal fence. However, plaintiff stated that was the only way in which to use the molding head with the table saw. The use of the wood facing, as described in the table saw owner's manual would not alleviate this hazard. It was only in the molding head owner's manual that the application of the wood fence is detailed. This wood face was designed to protect an operator, such as plaintiff, from the type of injury evidenced in this lawsuit. Coupled with the fact that the molding head and its packaging contain no warnings about the necessity of the auxiliary wood fence, this Court believes a genuine issue of material fact exists as to whether defendant's failure to adequately warn plaintiff was the proximate cause of his injury. A trier of fact could conclude that had plaintiff known of the need for the wood

fence, he would have taken the necessary precautions before operating the table saw with the molding head. See *Glittenberg, supra,* 441 Mich at 393.

Plaintiff's final claim is that the trial court did not address his third issue on appeal, as to whether an auxiliary fence should have been sold with the molding head as a necessary safety device. This issue is not preserved for appeal, because it was not addressed by the trial court. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997).

Reversed and Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Roman S. Gribbs
/s/ E. Thomas Fitzgerald